No. 20,641

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

See Vol. 3375

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

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Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

APPELLANT UNITED STATES OF AMERICA'S PETITION FOR REHEARING

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Appellant United States of America respectfully petitions his Court for rehearing of the judgment entered in this case on ugust 9, 1967. The bases for this petition are set forth below:

1. Appellees Betty K. Furumizo, et al., commenced this action gainst the United States and Baker Aircraft Sales, Inc., to

recover damages for the death of Robert T. Furumizo in an airpla accident at Honolulu International Airport. After trial, the di court held the United States liable on the ground that Federal Aviation Agency control tower personnel did not attempt "to exer their reasonable judgment" and did not attempt "to hold up the clearance a sufficient time to minimize the acute danger" to the Piper from the DC-8's wake turbulence (245 F. Supp. at 992, 1002 1003). This Court sustained the district court's finding of governmental negligence on the ground that the controller failed give a second warning on turbulence (Slip Op., p. 3).

2. The second-warning theory of governmental liability was raised in appellee Furumizo's amended complaint or in the distri court's pretrial order, and the case was not tried on that theor In the district court, appellee Furumizo's theory was that the U States negligently failed "to provide proper and adequate safegu for the protection of the decedent from the hazards of 'turbulen wake,'" and negligently cleared the Piper "for takeoff directly the 'jet wash' of [the] DC-8" (245 F. Supp. at 985). The distri court did not make any findings of fact and conclusions of law stating that a second warning should have been issued and that t failure to issue it was a proximate cause of the accident. Whil the district court concluded that the failure of the tower controllers "to exercise any judgment under the circumstances constituted negligence . . . and was a contributing cause of the accident" (245 F. Supp. at 992), it failed to determine what act

controllers should have taken when they saw the Piper begin its
e-off. Although this Court stated that the second-warning theory
fully supported by the evidence" (Slip Op., p. 3), evidence was
introduced on the issue of whether the controllers might have
vented the accident by issuing a second warning in the time
ween the start of the Piper's take-off and its point of no return.

3. There was, in any event, no occasion for the controllers to
ue more than one warning on turbulence in the circumstances of
s case.

a. The Manual merely provided that "[w]hen controllers foresee
possibility that departing . . . aircraft might encounter . . .
g tip vorticies from preceding aircraft, cautionary information to
s effect should be issued to pilots concerned." Manual, 411.7.
this case, Controller Humphreys issued such information to Shima,
pilot in command of the Piper, when he radioed the following
sage to him--"PIPER NINE NINE ZULU CAUTION TURBULENCE DEPARTING
8 CLEARED FOR TAKE-OFF." Shima apparently received Humphreys'
nsmission since he immediately executed his take-off clearance.
these circumstances, there was nothing further the controllers
ld do to prevent Shima from disregarding the warning he had
eived and taking off "without waiting long enough for the wake
bulence to dissipate" (Slip Op., p. 3). For, as this Court has
effect determined, Shima should have known of the danger to the
er from the preceding DC-8's wake turbulence (Slip Op., pp. 4-6),
there is no evidence that he would have paid any more attention
a second warning than he did to the first. The Manual directed

the controllers to predicate clearances, instructions and informat "solely upon observed or known traffic or airport conditions which in their judgment, may constitute collision hazards to aircraft." Manual, 411.1. And under the Civil Air Regulations, Shima alone w "directly responsible for" and had "final authority as to" the Pip operation. 14 C.F.R. 60.2 (1961 rev.).

b. Moreover, this Court overlooked the fact that there was a least one safe way for the Piper to take-off immediately after it received its clearance. At this airport, a usual practice of smal airplanes on Runway 4-L to avoid the turbulence from large airpla on Runway 8 was to roll through Runway 8 on the ground under the turbulence before lifting off and climbing out (Tr. 1332, 1338-13 1345-1346, 1348, 1351-1352). Controller Garcia was fully aware o this practice and testified that pilots of light aircraft such as t Piper "would keep the airplane low and roll out across the runway itself [Runway 8], and then start the climb-out"; "[t]hey wouldn' start to lift up until they crossed that runway" (Tr. 1041-1042). Thus, when he saw the Piper begin its take-off roll, he could only assume that its pilot was going to follow that safe method of taki off, and there was no occasion to issue a further warning. 1/

1/ The district court determined that Controller Garcia should have done more than issue the warning (245 F. Supp. at 1011-1012. However, it is undisputed, as the district court found, that Garc saw the Piper begin its take-off roll "and immediately thereafte" turned his attention elsewhere; he did not again see the Piper until it was caught up in the DC-8's turbulence (245 F. Supp. at 989-990; Tr. 342-344, 365, 978-979, 1069, 1077-1078). Hence, Garcia did not see the Piper disregard the warning by lifting of before reaching the Runway 8 intersection.

It is, indeed, doubtful whether any of the controllers had an opportunity to issue a second warning and whether such a warning might have prevented the accident. For the Piper encountered the DC-8's turbulence in the vicinity of the tower and actually crashed some 1,000 feet from the place at which it started its take-off roll (245 F. Supp. at 990). Yet it probably rolled about 600-700 feet before lifting-off the ground and climbing out at 70-80 miles per hour (Tr. 282-283, 287, 289-290, 292-293).

In sum, this Court's decision has subjected the United States to liability on a theory of which it had no notice and which it had no opportunity to meet. In any event, the record here indicates that the United States was not negligent under that theory.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted and the judgment of the district court against the United States should be reversed.

Respectfully submitted,

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SEPTEMBER 7, 1967

CERTIFICATES

I hereby certify that, in my judgment, this petition for rehearing is well founded, and it is not interposed for delay.

I hereby certify that, in connection with the preparation of this petition for rehearing, I have examined Rules 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with those rules.

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AFFIDAVIT OF SERVICE

I hereby certify that on this 7th day of September, 1967, five copies of the foregoing petition were served by airmail, special delivery, postage prepaid, on opposing counsel as follow

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[SEAL]

Subscribed and sworn to before me this 7th day of September, 1967.

Angeline Johnson
NOTARY PUBLIC